NO. 82-438

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BEHRING INTERNATIONAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENT, BEHRING INTERNATIONAL, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of the Question Presented

Whether the United States Court of Appeals for the Third Circuit correctly concluded that the National Labor Relations Board had failed to establish that layoffs by Behring International, Inc. violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3) (1976) because the National Labor Relations Board, after merely introducing evidence sufficient to raise an inference that antiunion animus was a motivating factor for the discharges, improperly shifted to Behring the ultimate burden of persuasion to establish the real cause of the discharges.

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BRIEF OF RESPONDENT, BEHRING INTERNATIONAL, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

The events underlying this action occurred in the spring of 1977 at a warehouse in Edison, New Jersey (hereinafter "the warehouse") which was owned and operated by respondent Behring International, Inc. (hereinafter "Behring").

Local Union No. 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 478") began an organizational campaign at the Behring warehouse on March 13, 1977. (Appendix to Petition by the National Labor Relations Board for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, p. 2a. (hereinafter cited as "——a.")). A petition for a consent election was filed on behalf of Local 478 on March 22, 1977 and the election was held on April 25, 1977 (2a, 31a). A majority of the warehouse employees voted against the Union and no objections to the election or the conduct of the campaign were filed (2a). Thereafter, three warehouse employees were laid off on May 6, 1977 because the warehouse was overstaffed at that point in time (2a, 52a).

On May 26, 1977 Behring executed a contract to subcontract the warehouse work to an independent, outside contractor known as ESP, Inc. (2a, 52a). Five of the remaining warehouse employees were laid off on June 3, 1977 as a result of Behring's decision to subcontract for replacement labor with an outside firm (2a, 52a). The Administrative Law Judge (hereinafter "the A.L.J.") found, and the National Labor Relations Board (hereinafter "the Board") agreed, that the layoffs of May 6 and June 3, 1977 violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3) (1976) (hereinafter "§8(a)(3)") because they were discriminatorily motivated (4a).

The historical context of the allegedly discriminatory layoffs of May 6 and June 3, 1977 amply rebuts any inference that the layoffs were discriminatorily motivated and fully supports the contrary inference that they were motivated by legitimate business reasons. Behring entered into

a contract with the Imperial Iranian Air Force (hereinafter "the I.I.A.F.") on August 11, 1975 to provide freight forwarding services to the I.I.A.F. purchasing mission in the United States (30a). Behring established the warehouse in November, 1975, pursuant to a freight forwarding contract with the I.I.A.F., to store and process for shipment to Iran material purchased for the I.I.A.F. (30a). The layoffs here at issue and the decision of Behring to subcontract the warehouse labor were directly caused by adverse business developments during the period beginning June, 1976 and continuing through June, 1977.

In June, 1976 a change in I.I.A.F. operations required Behring to interface with the I.I.A.F. logistics system (51a). This compelled Behring to incur increased administrative costs and to log significantly more computer time, without receiving any increased revenue from the I.I.A.F. (51a). In December, 1976 the I.I.A.F. acquired a fleet of cargo carriers (51a). This resulted in a substantial reduction in Civil Aeronautics Board commissions that Behring had been earning on charter flights, reduction of ocean bookings and reduction of brokerage fees for ocean bookings (51a). The net effect of these changes was a 30% to 70% reduction in the volume of activity at the Edison warehouse.

These developments led George Murphy, the warehouse manager, to recommend to Alan Newhouse, the President of Behring, that a study of savings to be realized by subcontracting the work be initiated and that the warehouse labor be subcontracted if the results of the study so indicated (51a). This is documented by a cable that Mr. Murphy sent to Mr. Newhouse on January 27, 1977 (51a), fully two months before the election petition was filed, and at a time when there was no organizational activity among the warehouse employees.

The substantially reduced volume of activity at and level of revenues flowing from the warehouse persisted through the time of subcontracting, in June, 1977 (51a-52a). Thus, the record below indicates that in March, 1977 there were no more than five or six hours work per day for the warehouse employees. The remaining hours of the day were filled with cleanup work and playing ping-pong, for which warehouse personnel were also paid. (Joint Appendix filed on behalf of Behring International, Inc., on review from the National Labor Relations Board, No. 81-1937, at page 550, line 12 through page 552, line 5. (hereinafter cited as "JA——:——")). This state of affairs served to dramatically highlight the need to do something to reduce labor costs at the warehouse.

In May, 1977, the study of labor cost savings realizable through subcontracting the warehouse work was completed and forwarded to Mr. Alan Newhouse (50a). The study indicated that Behring could realize labor savings of $137,000 per year if the warehouse work was subcontracted out (JA627:12). The A.L.J. specifically recognized that subcontracting the warehouse labor "could be financially beneficial" and that Behring "could have reduced its costs by laying off most of its own warehouse employees and subcontracting their work" (62a-63a). Accordingly, on May 26, 1977 Behring entered into a contract with ESP, Inc., an independent subcontractor, to subcontract the warehouse work (2a). The five layoffs occurred one week thereafter, upon the recommendation George Murphy, warehouse manager, to Mr. Newhouse (52a).

Both the A.L.J. and the Board agreed that the General Counsel had made a *prima facie* evidentiary showing sufficient to permit the inference that antiunion sentiment had been a motivating factor in the decision to lay off

the warehouse employees (24a-25a).* The record below demonstrates with absolute clarity that at all times Behring has steadfastly denied that antiunion sentiment caused the discharges.

Behring met the Board's *prima facie* case by producing substantial evidence that the decision to lay off the warehouse employees and to subcontract the warehouse labor had been contemplated by Behring well before the advent of the representation campaign, in response to a continuous decline in revenues and activity at the warehouse over the course of the preceding year (51a-52a). Thus, the initial permissive inference of discriminatory motivation arising from the General Counsel's *prima facie* case was at the very least neutralized by the contrary inference of non-discriminatory business justification arising from Behring's proofs (14a-15a).

Conceding that the option of subcontracting had been studied by Behring for years and that the decision to subcontract was economically justified, the A.L.J. ruled that the layoffs and discharges nonetheless violated §8(a)(3) because they were "in part" motivated by Behring's alleged antiunion animus (62a-63a). By contrast, the Board held that Behring had *failed* to establish a legitimate business reason for the layoffs and discharges. Relying upon its recent decision in *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (March 2, 1982), the Board held that Behring had

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* This *prima facie* showing consisted of evidence of violations of Section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1) (1976), in the course of a representation election campaign and the fact that the two employees allegedly opposing the union had been retained in a supervisory capacity after other warehouse employees had been discharged (24a-25a; 61a-63a).

not met *the burden of persuasion* to substantiate its economic defense by a preponderance of the evidence because Behring could "point to no contemporaneous event which might have motivated the layoffs at that time." (25a).

REASONS FOR DENYING THE WRIT

I. The language of the National Labor Relations Act is clear on its face and the issue presented herein has been resolved in a closely analogous context by the Court's recent decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

Behring concedes that a conflict exists between the various circuit courts of appeal regarding the proper allocation of the burdens of persuasion and of producing evidence as to the employer's true motivation in cases of allegedly unlawful employee discharges in violation of §8(a)(3). Nevertheless, the Court should not grant the writ because the plain language of the National Labor Relations Act, 29 U.S.C. §151 *et seq.* (1976) (hereinafter "The Act"), explicitly places the burden of persuasion on the Board to establish the existence of unfair labor practices by a preponderance of the evidence. 29 U.S.C. §160(c)(1976). Furthermore, this precise issue has already been resolved by this Court in the closely analogous context of alleged discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq.* *See Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

In *Burdine*, this Court clearly held: (1) that *the burden of persuasion* to establish that discrimination motivated a discharge rests with the complaining party at all times;

and (2) that after the plaintiff establishes a *prima facie* case, creating a permissive inference that a discharge was motivated by discrimination, the employer has *the burden of producing evidence* of a legitimate reason for the discharge. 450 U.S. at 254, 259-260. This identical allocation of the burdens of persuasion and of producing evidence is required by the express language of the Act, and is consistent with the legislative history of the Act. *See* 29 U.S.C. §160(c) (1976) (hereinafter "§10(c)").

The Act plainly places the burden of persuasion upon the General Counsel to establish that a violation of §8(a)(3) has occurred. In this regard §10(c) provides in pertinent part as follows:

> If *upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact . . .

29 U.S.C. §160(c)(1976) (emphasis added).* The Board's own regulations state that "[t]he Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act." 29 C.F.R. §101.10(b) (1981). Furthermore, Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d) (1976), provides in pertinent part that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

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* It should be noted that §10(c) of the Act clearly preserves management's historical prerogative to discipline and discharge employees "for cause." 29 U.S.C. §160(c) (1976). *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937) (Act does not interfere with normal exercise of managerial discretion with respect to hiring and firing).

In light of this clear and compelling statutory command it is entirely inappropriate to resort to the legislative history of the Act. The United States Courts of Appeal for the First and Third Circuits have found that the language of the Act is clear in this regard and that the legislative history is inconclusive at best. *See Behring International, Inc.* v. *NLRB,* 675 F.2d 83, 88 n.5 (3d Cir. 1982); *NLRB* v. *Wright Line, A Division of Wright Line, Inc.,* 662 F.2d 899, 904 n.8 (1st. Cir. 1981), *cert. denied,* 50 U.S.L.W. 3695 (March 2, 1982). The Board's strained reading of highly selective quotations from the legislative history of one sentence of §10(c) that does not even address allocation of burdens of proof is not convincing.* Indeed, the legislative history the Board quotes demonstrates that the speakers were not aware of the critical distinction between the burden of persuasion and the less onerous burden of producing evidence.

Where, as here, an employer asserts that it discharged employees for legitimate business reasons and not for the purpose of discouraging union activity, the Board must determine "the 'true purpose' or 'real motive' in hiring or firing." *Local 357, International Brotherhood of Teamsters* v. *NLRB,* 365 U.S. 667, 675 (1961). The Board must determine whether the employer's alleged antiunion sentiment or the proffered business reason was the *cause in fact* of the discharge. If the Board finds that the discharge violated §8(a)(3) because antiunion sentiment, rather than a legitimate business reason, was the "true cause", the Act requires that this finding must be supported by the preponderance of the evidence. *See* 29 U.S.C. §160(c), *supra.*

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* The sentence of §10(c) on which the Board's legislative history argument rests concerns limitations on the Board's power to order reinstatement and back pay for individuals discharged for cause.

This Court has confronted the problem of allocating the burdens of persuasion and of producing evidence in the context of cases alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq.* The line of cases culminating in *Burdine, supra,* has developed the correct method of ascertaining whether a defendant employer's actions were discriminatorily motivated or were caused by legitimate, nondiscriminatory reasons:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, supra, 450 U.S. at 252-253. (citations omitted).

In *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567 (1978), this Court cogently explained the nature and effect of a *prima facie* showing of discrimination with respect to employment:

> *A McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination,* however. Rather, it is simply proof of actions taken by the employer from which we *infer* discriminatory animus because experience has proved that *in the absence of any other explanation* it is more likely than not that those actions were bottomed on impermissible considerations.

Id. at 579-580 (emphasis added). Referring to the employer's burden "to *articulate* some legitimate, non-discriminatory reason for the [employer's actions]", *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973) (emphasis added), this Court has held that:

> We think that there is a significant distinction between merely "articulat[ing] some legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive." . . . the former will suffice to meet the employee's *prima facie* case of discrimination. Because the Court of Appeals appears to have imposed a heavier burden on the employer than *Furnco* warrants, its judgment is vacated and the case is remanded for reconsideration in the light of *Furnco* . . . We quite agree with the dissent that under *Furnco* and *McDonnell Douglas* the employer's burden is satisfied if he simply "explains what he has done" or "produc[es] evidence of legitimate nondiscriminatory reasons."

Board of Trustees of Keene State College v. *Sweeney*, 439 U.S. 24, 25 n.2 and accompanying text (1978) (citations omitted).

In *Burdine, supra,* the Court of Appeals ruled that the employer had not rebutted the plaintiff's *prima facie* case of discrimination because it had failed "to prove nondiscriminatory reasons *by a preponderance of the evidence.*" *Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979) (citation omitted) (emphasis added). The Court of Appeals was reversed precisely because it had improperly placed the *burden of persuasion* on the employer to establish a legitimate, nondiscriminatory reason by a preponderance of the evidence. In so holding, this Court stated:

> The burden that shifts to the defendant, therefore, is *to rebut* the presumption of discrimination *by producing evidence* that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. *The defendant need not persuade the court that it was actually motivated by the proferred reasons.*
>
> . . .
>
> [T]he Court of Appeals erred by requiring the defendant to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating the respondent . . . When the plaintiff has proved a *prima facie* case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions.

Burdine, supra, 450 U.S. at 254, 259-260 (emphasis added) (citations omitted).

In *Wright Line, A Division of Wright Line, Inc.,* 251 N.L.R.B. 1083 (1981), *enforced,* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 50 U.S.L.W. 3695 (March 2, 1982), the Board articulated the rule that it would apply henceforth in resolving cases which present competing explanations for an employer's decision to discharge employees.* *Wright*

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* In *Wright Line, supra,* the Board articulated the following test (hereinafter "the *Wright Line* test") for determining the true case of discharge in so-called "dual motivation" cases:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

251 N.L.R.B. at 1089.

Line employed a "but for" test of causation analysis. Dispensing with analytical models previously employed, the *Wright Line* test essentially states that a violation of §8(a)(3) is proven when it is shown that the employer would not have discharged its employees but for their union activity. The Board purportedly derived this test from the opinion of the Supreme Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1974).

Upon closer analysis, it becomes apparent that, in derogation of the express requirements of the Act, the effect of the *Wright Line* test is to enable the Board to find that an employer has violated §8(a)(3) *without* requiring the Board to demonstrate by a preponderance of the evidence that the employee would not have been fired but for his protected activity. Instead, once the General Counsel has produced sufficient evidence to permit an inference that the employer's alleged antiunion sentiment was a motivating factor in the decision to discharge, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line, supra*, 251 N.L.R.B. at 1089. It is not enough for the employer to meet the permissive inference of discriminatory intent by producing evidence sufficient to permit a contrary inference that the employee was discharged for legitimate, non-discriminatory reasons. The *Wright Line* test clearly places upon the employer the risk of non-persuasion (i.e., burden of persuasion) to show by a preponderance of the evidence that the discharge would have occurred even if the employee had not engaged in protected activity.

The *Wright Line* test, as applied by the Board, allows the Board, upon establishing nothing more than a permissible inference, to conclude that antiunion animus was

the "true cause" of discharge in each case where the employer fails to prove by a preponderance of the evidence that the employee was discharged for legitimate business reasons. This test reverses the allocation of the burden of proof required by express statutory language: it requires the *employer* to prove by a preponderance of the evidence that its actions were *not* motivated by antiunion sentiment. This is precisely what happened to Behring in the instant case. Behring produced unrefuted and credited evidence which was obviously sufficient to support the inference that the decision to subcontract and to reduce the warehouse labor force was economically justified. At the very least Behring's evidence was sufficient to neutralize entirely the inference created by the Board's *prima facie* case.

The A.L.J. specifically found that subcontracting would be economically advantageous (62a). Notwithstanding this finding the A.L.J. found that the discharges and subcontracting violated §8(a)(3) because they were motivated "in part" by animus (63a). Significantly, the Board, applying its *Wright Line* analysis, ruled that Behring *failed* to establish the economic justification because it could point to no contemporaneous event to justify the timing of the layoffs and the decision to subcontract (25a).

It cannot be overemphasized that the General Counsel only established a *prima facie* case, *i.e.*, a showing sufficient to permit an *inference* as to the ultimate issue of whether the true cause for the discharge was antiunion animus. This is *not* equivalent to a factual finding of discriminatory intent. *See Furnco Construction Corp.* v. *Waters, supra,* 438 U.S. at 579-580. The General Counsel had not conclusively established that Behring discharged the warehouse employees *because of* antiunion animus. Yet the burden the Board placed on Behring plainly and im-

properly exceeded the burden of rebutting the *prima facie* case.*

II. The Third Circuit's decision does not conflict with this Court's decision in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

The Board's assertion that the writ should be granted because the Third Circuit's decision is somehow at odds with this Court's decision in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), is without merit. *Mount Healthy* is plainly inapposite to the instant matter.

First, *Mount Healthy* involved the discharge of a school teacher in violation of the First Amendment, U.S. Const.,

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* As Professor Wigmore has stated:

> "[A] 'prima facie' case . . . need not be overcome by a preponderance of the evidence or by evidence of greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and, if this be done, the burden of the evidence is met and the duty of producing further evidence shifts back to the party having the burden of proof. . . ."

9 Wigmore on Evidence §2487, at 282 (3d ed. 1940) (quoting *Speas* v. *Merchants' Bank & Trust Co.*, 188 N.C. 524, 125 S.E. 398 (1924)).

Further, the Federal Rules of Evidence, which the Taft-Hartley amendments to the Act make applicable to unfair labor practice proceedings before the Board, 29 U.S.C. §160(b), clearly distinguish between the burden of persuasion and the burden of rebutting presumptions arising from a *prima facie* case, and state that the burden of persuasion "remains throughout the trial upon the party on whom it was originally cast." Fed. R. Evid. 301.

Amend. 1, and did not involve the provisions of the National Labor Relations Act. As a result, in *Mount Healthy*, this Court was free to allocate the respective burdens of proof without regard to statutory restrictions. However, in the present case, the Board is bound by the explicit statutory restrictions of the Act, 29 U.S.C. §160(c), and is precluded from shifting the burden of persuasion to an employer. *Behring International, Inc.* v. *NLRB*, 675 F.2d 83, 88 (3d Cir. 1982).

Second, the Court in *Mount Healthy* did not address the allocation and shifting of evidentiary burdens with respect to inferences as to the true motivation for discharge. In *Mount Healthy* the improper motivation was directly and concretely established by the written admission of the employer. The apparent evidentiary burden placed on the employer in that case was to establish an affirmative defense and was, therefore, one of persuasion on that issue.*

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* *Arlington Heights* v. *Metro. Housing Corp.*, 429 U.S. 252 (1977) does not alter this analysis in the least. In that case, plaintiffs sought to establish a violation of the Equal Protection Clause, U.S. Const., Amend. 14, by demonstrating the racially discriminatory impact of a decision by the defendant Village's zoning board. The Supreme Court reversed the Court of Appeals' grant of relief, holding that discriminatory impact, without a finding of discriminatory intent, was not sufficient to establish a violation of the Equal Protection Clause. 429 U.S. at 270. The Court discussed, in *dicta*, indicia of discriminatory intent, but did not differentiate between the effect of an inference of discriminatory intent arising from a *prima facie* showing and the effect of a *factual finding* of discriminatory intent. Indeed, the opinion strongly suggests that a *prima facie* showing of discriminatory intent had not been made. *Id.* at 268, 269, 270 n. 21. The language contained in the opinion to the effect that the defendant has "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered" was *dicta*. *Id.* at 270 n. 21.

Unlike the *Mount Healthy* case, in the present case, the only burden that could be properly placed upon Behring was to come forward with evidence to rebut or neutralize an inference of improper motivation. Behring clearly met this burden.

CONCLUSION

For all the foregoing reasons, the petition to the National Labor Relations Board for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied. In addition, the request of the National Labor Relations Board to have the petition for a writ of certiorari in this case held and disposed of in light of the disposition of No. 82-168, *NLRB* v. *Transportation Management Corp.* should be denied.

In the alternative, if the Court decides to grant the writ of certiorari in *Transportation Management* and to hold and dispose of the writ in this case in light of the disposition of *Transportation Management,* Behring respectfully requests the Court to consolidate the two matters and afford Behring a full opportunity to brief and argue the questions presented on the merits.

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